ORAL ARGUMENT SCHEDULED FOR APRIL 3, 2017

No. 16-1316
[Consolidated with No. 16-1367]

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

KING SOOPERS, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

PETITION FOR REVIEW AND
CROSS-APPLICATION FOR ENFORCEMENT
OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD
NLRB CASE NO. 27-CA-129598

PETITIONER'S REPLY BRIEF

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GLOSSARY

King Soopers relies on, and incorporates herein, the Glossary used in its Opening Brief.

PRELIMINARY STATEMENT

Petitioner, King Soopers, Inc. ("King Soopers" or "Petitioner") filed its Opening Brief ("OB") on December 23, 2016 asking the Court to set aside the National Labor Relations Board's ("Board" or "NLRB") August 24, 2016 Decision. On February 2, 2017, the Board's General Counsel ("GC") filed its Answering Brief ("AB"). King Soopers files this Reply in Support of its Opening Brief ("Reply"). The Board's Decision is not supported by substantial evidence and departs from established precedent without reasoned justification.

STATUTES AND REGULATIONS

All applicable statutes and regulations were reproduced in Petitioner's Opening Brief.

SUMMARY OF ARGUMENT

The GC's Answering Brief is no more than a recitation of the Board's findings. Other than quoting the Board and ALJ and conclusorily stating those decisions should be enforced, the GC offers no position as to why the Board and ALJ's analyses are supported by substantial evidence and are consistent with applicable law. Nor did the GC address the Board's failure to conduct a

substantive review of the ALJ's Decision and consider the ALJ's errors. The Board's blanket adoption of the ALJ's legal and factual findings cannot survive judicial scrutiny and the GC's Answering Brief does nothing to undermine this conclusion. Nor is the Board's expansion of the Act's remedies consistent with its statutory mandate. The Board is not permitted to award employees a windfall and punish employers in the name of "deterrence." The Board's Decision must be set aside in its entirety.

ARGUMENT

A. The Board's "Findings" Of Fact.

In its statement of facts, the GC, like the ALJ and Board before it, simply restates its preferred evidence and casts aside conflicting evidence that does not support its position. The Court must look behind the curtain of the Board's preferred evidence and determine whether the Board's findings are supported by substantial evidence. As the Supreme Court has stated,

> When the Board purports to be engaged in simple factfinding, unconstrained by substantive presumptions or evidentiary rules of exclusion, it is not free to prescribe what inferences from the evidence it will accept and reject, but must draw all those inferences that the evidence fairly demands. "Substantial evidence" review exists precisely to ensure that the Board achieves minimal compliance with this obligation, which is the foundation of all honest and legitimate adjudication.

Allentown Mack Sales & Serv., Inc. v. N.L.R.B., 522 U.S. 359, 378–79 (1998); *Aggregate Indus. v. Nat'l Labor Relations Bd.*, 824 F.3d 1095, 1100 (D.C. Cir.

2016) ("The Board's discretion does not give it license to rely on an oversimplified view of the facts or to 'refuse to credit probative circumstantial evidence.'"). The Board has failed to draw reasonable inferences from the evidence and has chosen, instead, to credit only that evidence which supports a finding that King Soopers violated the Act.

By way of example,[1] the GC states that the "Union interprets both [the meat and retail] contracts to prevent employees from performing work outside their assigned departments." AB 20.[2] Union Representative Craine's testimony on this point, as well as testimony regarding Union Steward Jackson's admonition to Geaslin, undermine this conclusion. Craine specifically testified there is nothing in either CBA that prohibits Starbucks clerks from sacking groceries or helping other departments. App. 195:22-25. Similarly, in March 2014, Union Steward Jackson admonished Geaslin that she was required to sample products from the Bakery – a separate department from Geaslin's – and that she must follow management's instructions. App. 235:11-17. Consistent with this evidence, then-Board Member Miscimarra stated, "there is nothing in the CBA that would prevent a Starbucks

[1] The examples included herein are based only on the "facts" as they were portrayed by the GC. There are other examples of the Board's predisposition in King Soopers' Opening Brief. OB 16-21.

[2] Citations in this Reply will be as follows: "App. ___" to indicate the Appendix page numbers. Citations to the Board's Answering Brief will use the page number in the Court's filing stamp, not the page number the GC assigned to the Brief.

barista from performing incidental bagging duties" and "Article 7 Section 26 of the CBA provides that employees may perform incidental work in another classification without violating this agreement." App. 1222-1223 (BDD at pp. 10-11). If the Union interpreted the contracts to forbid employees from working outside their assigned departments, it would have filed a grievance challenging King Soopers' directives that Geaslin do so.[3] The Union did not file such a grievance. App. 235:23-25; 236:1-4.

The GC's preferred evidence is also undermined by King Soopers' "Customer First" initiative. App. 232:1-5. This initiative requires every employee to provide customer service, irrespective of his or her position at the store. *Id.* Geaslin specifically testified that helping in other departments, including sacking groceries, is consistent with the Customer First initiative and King Soopers' values. App. 121:7-25.

Similarly, the GC's statement, and citation to the Board's finding, that Eastburn testified "it was unusual for employees who were not under the retail contract to bag groceries" ignores contradictory evidence. AB 20. Eastburn specifically stated that she would have helped sack if she were working in

[3] The GC's discussion of how regularly employees work across departments ignores the longstanding principle of labor law that employees are required to "work now, grieve later." The GC, like the ALJ and Board before it, fails to consider this requirement when evaluating Geaslin's conduct.

Starbucks and that she has actually checked out customers at Starbucks when there is a long line of customers at the front end. App. 224:9-16. Moreover, employees regularly help other departments when those departments are busy. App. 223:16-21; 224:12-16; 231:9-17; 256:13-15; 257:6-15; 282:14-25; 283:1. Thus, the Board's conclusion that the CBA prohibits employees from helping other departments is not supported by substantial evidence.

The Board also omitted undisputed testimony from both Pelo and Barbos that when Geaslin approached Pelo on May 9, Pelo started by thanking her for coming to help, to which Geaslin responded "no," she was not there to help. App. 255:21-25; 256:1; 283:18-22. The Board's Decision also ignores the testimony of all of the witnesses to the May 9 encounter, other than Geaslin, that Geaslin never agreed to sack groceries and Geaslin did not put her hands up in the air or walk away to sack groceries. App. 217:22-25; 218:1-2; 256: 12-19. The Board's failure to consider this evidence is fatal to its Decision.

The ALJ and the Board failed to reconcile the above conflicting evidence – as well as other evidence that did not fit their story – and, in many cases, simply cast it aside without even considering it. The Board's legal conclusions founded upon this defective approach are not supported by substantial evidence and, therefore, must be set aside. *See Sutter E. Bay Hosps. v. N.L.R.B.*, 687 F.3d 424, 436-37 (D.C. Cir. 2012).

B. The Board Erred in Permitting the GC to Amend the Complaint.

In its Answering Brief, the GC, like the Board and ALJ before it, ignored the well-established test for amending a Complaint. AB 55, 65-67. Indeed, the GC only restates the Board's conclusion that King Soopers had an opportunity to litigate the GC's amendments, without regard for the other factors for amendment. AB 56, 65-66.

It is well-settled that the Board may not deviate from its precedent without a reasoned explanation. *See W & M Properties of Conn., Inc. v. N.L.R.B.*, 514 F.3d 1341, 1346-47 (D.C. Cir. 2008). Because the Board failed to evaluate the established factors for amendment, and performed absolutely no evaluation of the facts and how those facts support its conclusion, the Board's Decision relating to the amendments does not survive judicial scrutiny. *See United Food & Commercial Workers Int'l Union, Local 150-A v. NLRB*, 880 F.2d 1422, 1439 (D.C. Cir. 1989).

The Board's Decision must also be vacated because there is no reasonable basis in law to permit the GC's tardy amendments in this case. According to the GC, the amendment to add an enhanced remedy request was fully litigated because the Board invited additional briefing on whether the law should be amended to permit an enhanced remedy. AB 66. It is a non-sequitur for the Board to invite briefing on the GC's request for an enhanced remedy, but conclude it was fully

litigated. The ALJ had already precluded King Soopers from presenting relevant evidence regarding Geaslin's search-for-work efforts and the merits of the requested enhanced remedy.

By keeping King Soopers from litigating the merits of an enhanced remedy award, the ALJ foreclosed King Soopers' ability to defend itself against such an award. It is of no solace that the enhanced remedy award can be addressed in a back pay proceeding, if any is needed. At that stage, the issue is *how much* to award, not whether the enhanced remedy should be awarded in the first place. *Starcon International v. NLRB*, 450 F.3d 276, 279 (7th Cir. 2006) (Posner, J.) ("There is a difference between entitlement to relief and the amount of relief to which one is entitled."). Moreover, it is undisputed that King Soopers had no notice of the GC's intent to seek an enhanced remedy and the GC did not offer a valid excuse for the delay. OB 23-24. Thus, the Board's Decision must be set aside.

The Board's two sentence footnote rubber stamping the ALJ's approval of the GC's mid-trial amendment to add an interrogation claim is similarly insufficient to satisfy its burden to justify its conclusions. *See United Food*, 880 F.2d at 1439. In its Answering Brief, the GC ignores the fact that King Soopers did not have an opportunity to question Geaslin regarding the alleged March 2014 interrogation *with the knowledge* that it was defending against an interrogation

claim. *See* OB 24-26. Neither does the GC address that there was no justification for the untimely amendment nor that King Soopers did not have notice it would be defending against such an allegation. Rather, the GC simply restates the ALJ's findings and then conclusorily states "the Company has failed to provide any basis to disturb the Board's findings." AB 57.

C. The Board Departed from Established Precedent by Not Deferring This Matter to the Grievance and Arbitration Process.

The GC claims "the Board found that deferral was not appropriate because the Union refused to take Geaslin's grievance to arbitration nor did the parties resolve the grievance." AB 49. The GC's characterization of the Board's Decision is erroneous. The Board did not find, *or even consider*, whether the parties resolved Geaslin's grievance under *Alpha Beta*, 273 NLRB 1546 (1985). That omission alone requires reversal of the Board's Decision. *See Titanium Metals Corp. v. N.L.R.B.*, 392 F.3d 439, 446 (D.C. Cir. 2004).

All of the requirements for deferral under *Alpha Beta* are satisfied here. OB 26-29; *see Alpha Beta Co.*, 273 NLRB at 1547-48. It is immaterial that King Soopers and the Union did not enter a formal settlement agreement resolving Geaslin's grievance. Indeed, it would be an anomalous result if *Alpha Beta* deferral hinged on the existence of a formal settlement agreement. *Alpha Beta* deferral is premised upon the requirement of a "fair and regular" resolution to the grievance. 273 NLRB at 1547. If resolution of a grievance occurs pursuant to a

fair and regular withdrawal of the grievance, then the policy underlying *Alpha Beta* is satisfied and the matter should be deferred to that resolution.

Here, the Union's withdrawal of Geaslin's grievance after investigating the facts underlying the dispute and providing Geaslin an opportunity to argue in favor of pursuing arbitration ensured Geaslin's interests were heard and protected. Thus, regardless of whether the Union withdrew the grievance pursuant to a settlement agreement or following its own review and determination that it could not win[4] at arbitration, the grievance process has succeeded and the matter should be deferred pursuant to *Alpha Beta*.

The GC also adopts the ALJ's position that *General Dynamics Corp.*, 271 NLRB 187 (1984) is distinguishable on the basis that Geaslin "did everything possible to pursue her grievance . . . ." AB 51. Whether Geaslin made the decision to withdraw her grievance or the Union made that decision is a distinction without a difference. The Union's voluntary withdrawal of the grievance acts as a withdrawal by Geaslin. *See Plumbers & Pipefitters Local Union No. 520 v. N.L.R.B.*, 955 F.2d 744, 753 (D.C. Cir. 1992) ("Absent a breach of the duty of fair representation, the [union] was empowered to bind [the individual] to the result obtained through the grievance process."). The GC's restatement of the ALJ's

[4] Union Representative Craine specifically testified that the Executive Committee stated they denied the grievance "because they didn't believe that we could win it in arbitration" and Geaslin needed to "work now and grieve later." App. 186:2-14.

faulty position that this matter should not be deferred because neither Geaslin nor the Board could compel the Union to arbitrate is similarly erroneous. AB 49-50. It is not the Board's prerogative to interject itself into King Soopers and the Union's bargaining relationship in an effort to obtain a result more to its liking. *Plumbers & Pipefitters*, 955 F.2d at 753. Indeed, such interjection by the Board undermines its strong policy favoring deferral and weakens the value and efficacy of arbitration. *See American Freight System, Inc. v. N.L.R.B.*, 722 F.2d 828, 833 (D.C. Cir. 1983).

In light of King Soopers and the Union's long-standing and mature bargaining relationship, they are in the best position to evaluate Geaslin's conduct, not the Board. Because the Board failed to apply the proper legal standard and refused to defer this matter to King Soopers and the Union's resolution of Geaslin's grievance, the Board's Decision must be set aside.[5]

[5] *U.S. Postal Service*, 324 NLRB 794 (1997) – a case cited by both the GC and ALJ – is inapplicable because the Board in that matter concluded that a "precondition of *Collyer* deferral is that the charging party have the ability to obtain arbitral consideration of the grievance." *Id.* at 794. That is not a precondition of *Alpha Beta* deferral and, therefore, the Board's reasoning in *USPS* does not apply to this case. *See Plumbers & Pipefitters*, 955 F.2d at 756. Moreover, the Board in *USPS* did not evaluate whether deferral was appropriate under *Alpha Beta*.

D. The Board's Finding that King Soopers Interrogated Geaslin Is Not Supported by Substantial Evidence.

The Board rubber stamped the ALJ's finding that King Soopers interrogated Geaslin in March 2014. App. 1213 (BDD at p. 1). The GC responds by stating that "the Company appears to want the Board to fully restate the judge's reasoning rather than endorsing and affirming it . . . ." AB 39. King Soopers does not want the Board to "restate"[6] the ALJ's reasoning. King Soopers expects the Board to evaluate the issues and apply the facts to law; not simply rubber stamp the ALJ's conclusions. *See Point Park Univ. v. NLRB*, 457 F.3d 42, 49-50 (D.C. Cir. 2006). Regardless, Geaslin did not engage in protected concerted activity in March 2014. And, even if she did, Pelo's single question did not rise to the level of an interrogation in violation of the Act.

i. Geaslin did not engage in protected concerted activity in March 2014.

The GC argues Geaslin engaged in protected concerted activity in March 2014 because "Geaslin actually complained to the Union" when she spoke to Union Steward Jackson. AB 54. Just one page earlier, however, the GC recounts that Geaslin was "unaware that the coworker to whom she complained was a union steward." AB 52-53. The GC cannot have it both ways; it cannot simultaneously

[6] Nor would simply "restating" the ALJ's reasoning satisfy the Board's burden to provide a reasoned analysis. *Sutter E. Bay*, 687 F.3d at 437 ("[A] bare statement simply cannot survive judicial scrutiny"; merely "affirm[ing] the judge's conclusions" without providing any reasoning is insufficient).

rely on Geaslin's statement that she did not know Jackson was a Union Steward to support its position that Pelo interrogated Geaslin, and on the very next page rely on the fact that Jackson is a Union Steward to support its argument that Geaslin engaged in concerted activity. Geaslin either knew Jackson was a Union Steward or she did not. If she did know, then Geaslin was dishonest and Pelo's admonition that she did not like Geaslin's dishonesty is not an interrogation. If she did not know, then Geaslin did not engage in concerted activity.[7] *See* OB 22-32. Regardless, because the Board and GC are attempting to gain the benefit of both, contradictory findings, the Board's holding is not supported by substantial evidence.

ii. Geaslin was not unlawfully interrogated.

This Court considers five-factors to determine whether an interrogation occurred. *Perdue Farms, Inc., v. N.L.R.B.*, 144 F. 3d 830, 835 (D.C. Cir. 1998). The GC, like the Board, does not address these factors. Instead, the GC simply restates the ALJ's conclusions and offers no argument for why those conclusions are supported by substantial evidence or should be upheld. For example, the GC quotes the ALJ's finding that Pelo's "question has the unlawful intention of making Geaslin think twice about complaining to the Union." AB 55. (internal

[7] The GC claims "the Company mistakenly relies on inapplicable cases that do not involve seeking union assistance." AB 54, n. 14. Of course, Geaslin could not have been seeking Union assistance because, according to the ALJ (App. 1231), Geaslin did not know Jackson was associated with the Union.

quotations omitted). Yet, beyond this conclusory statement, neither the GC nor the Board described how Pelo's single question would restrain Geaslin from pursuing her Section 7 rights.

An isolated question, like Pelo's, is insufficient to create an indicia sufficient to find an interrogation. *See e.g., Chauffeurs, Teamsters & Helpers, Local 633 of N.H. v. NLRB*, 509 F.2d 490, 495 (D.C. Cir. 1974) ("Surely, an isolated and limited set of questions would not rise to the level of employer 'coercion.'") (internal footnote omitted); *Groendyke Transp., Inc. v. NLRB*, 530 F.2d 137, 144 (10th Cir. 1976) ("isolated, innocuous incidents of interrogation and unrelated conversations lacking the indicia of coercion" are insufficient to find an interrogation).

Ultimately, Pelo's alleged "interrogation" occurred on one single occasion and consisted of a single question. App. 53:10-22. Moreover, Pelo and Geaslin's conversation casually occurred while working on the sales floor and was not in an atmosphere of unnatural formality. *Id.* The GC concedes Pelo was not seeking information about Geaslin's Union sympathies and was not seeking information upon which to discipline Geaslin. AB 54-55. Thus, the March 2014 conversation lacks any indicia of coercion and the Board's interrogation finding must be set aside.

Geaslin was a known Union member and adherent. As the Board has held, interrogations of an "open and active" union adherent are not coercive and do not

violate the Act where the employer's inquiries were limited to the individual employee's involvement with the union, and the interrogation was not accompanied by threats or promises. *Rossmore House*, 269 NLRB 1176, 1181 (1984). It cannot be disputed that Pelo only asked Geaslin whether she complained to the Union. Pelo's question was not accompanied by any threats or promises. Thus, Pelo's question was not coercive and did not violate the Act.

E. The Board's Finding That King Soopers Discriminatorily Twice Suspended and Terminated Geaslin Should Be Set Aside.

i. Geaslin did not engage in protected concerted activity on May 9, 2014.

The Board found that Geaslin engaged in concerted activity on May 9, 2014 when she asked Pelo "whether she should be performing these [sacking] duties because she belonged to a different bargaining unit or union." App. 1213 (BDD at p. 1); App. 934 at 9-12 (16 ALJD 9-12). The GC simply recites this flawed finding without any analysis of its own, and then summarily concludes that the Board's determination comports with precedent.

The GC relies on the Board's finding that Geaslin's job duties did not include bagging groceries and that it was "unusual" for employees to help in other departments. AB 43-44. It is legally irrelevant whether Geaslin's "job description" included sacking groceries. The issue is whether Geaslin had "a reasonable and honest belief that [s]he [was] being . . . asked to perform a task that

[s]he [was] not required to perform under [her] collective-bargaining agreement." *NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 837 (1984). The issue is not whether Geaslin asserted a right in her *job description*. Job descriptions are not an exhaustive list of an employee's responsibilities and employees are regularly required to perform duties outside of those listed in their job descriptions. Indeed, as Geaslin herself testified, she knew she was required to sack groceries because of King Soopers' "Customer First" program. App. 121:7-25.

Moreover, of course it is "unusual" for employees to help in other departments. Employees are only asked to help sack groceries or assist other departments if those departments are *unusually* busy. App. 224:9-16 (Eastburn's testimony that she has helped to check out customers at the Starbucks when there is "a very long line" of customers in the front end). And, when the store is unusually busy, the undisputed evidence presented at trial is that employees regularly assist other departments. App. 223:16-21; 224:12-16; 231: 9-17; 256:13-15; 257:6-15; 282:14-25; 283:1.

Geaslin could not have had an honest and reasonable belief she was asserting a contract right not to sack groceries when she admitted she knew she was required to do so. Nor could Geaslin have held an honest and reasonable belief that she was not permitted to sack groceries when she had just been told *two months prior* by Union Steward Jackson that she was required to help other

departments. *See* App. 922 at 14-18 (4 ALJD 14-18); App. 234:18-235:17; 252:4-13. The Board's finding that Geaslin engaged in protected concerted activity on May 9, 2014 is not supported by substantial evidence.

The GC attempts to distinguish *ABF Freight Sys.*, 271 NLRB 35 (1984), by asserting that Geaslin does not have a history of refusing work orders. AB 47. To the contrary, however, Geaslin previously refused Panzarella's work order in March 2014 to sample bakery products. App. 922 at 14-18 (4 ALJD 14-18); App. 234:18-235:17; 252:4-13. Moreover, the GC's statement is contradicted by the ALJ's finding that Geaslin complained *three* times regarding her supervisors' work orders, twice in March and once in May. App. 935 at 11-13 (17 ALJD 11-13). Thus, Geaslin does have a history of refusing work orders and *ABF Freight* is controlling.

Even if *ABF Freight* were factually distinguishable, such a finding does nothing to undermine the validity of its statement of law that "[o]bstructively raising petty and/or unfounded complaints" does not meet the "reasonable and honest" belief requirements of *Interboro*. 271 NLRB at 36. Geaslin gave no reason – and the Board did not cite a reason – for her alleged belief that she was not required to sack and it is entirely unsupported by any basis in the CBA. The failure to offer *any evidence* whatsoever showing an honest and reasonable basis for Geaslin's *question* of whether she had to sack precludes a finding that it was.

To hold otherwise would permit employees to baldly claim a work order violates their contract solely to avoid performing the work. Such a result cannot be countenanced.

As described in the Opening Brief, the *Interboro* doctrine is founded on a "right rooted in a collective-bargaining agreement." OB 40-41 (citing *City Disposal*, 465 U.S. at 831-32, 839). Despite the GC's repeated statements to the contrary, the issue is not whether Geaslin was incorrect in her purported contract interpretation or whether the law protects reasonable, yet incorrect assertions. *See* AB 44-45. Rather, the issue is whether Geaslin had an *honest* and *reasonable* belief she was asserting a contract right. Because Geaslin knew she was required to follow Pelo's May 9 work order and she has provided no basis in the contract for her question, Geaslin did not have an honest and reasonable belief she was asserting a contract right.

Finally, Geaslin lost protection of the Act on May 9 because she engaged in self-help and insubordination in violation of the CBA. OB 41-42. The Board failed to analyze this issue and, therefore, the Board's Decision is not entitled to any deference. *See Sutter*, 687 F.3d at 437. Even if all of the ALJ's findings of fact are upheld, however, it is undisputed Geaslin protested and refused to follow her supervisor's *three* work instructions for several minutes. The GC's argument that Geaslin's "approximately one minute of questioning" was not long enough to

amount to a work stoppage is unpersuasive. AB 48. The GC provides no support for its "one minute" estimation; no evidence was presented as to how long Geaslin and Pelo's May 9 discussion on the sales floor lasted. Because Geaslin refused to "work now, grieve later" and, instead, chose to engage in self-help and insubordination, Geaslin's May 9 conduct was not protected by the Act.

ii. Geaslin did not engage in protected concerted activity on May 14, 2014.

The Board's failure to evaluate the ALJ's four-sentence finding that Geaslin engaged in protected concerted activity during the May 14 meeting and its rubber stamp of the ALJ's conclusion are entitled to no deference. *See* App. 1214 (BDD at p. 2); *see also United Food*, 880 F.2d at 1439. The Board's holding must also be set aside because it is not supported by substantial evidence. Geaslin did not assert a contract right during the May 14 meeting and that meeting was not a "grievance meeting." OB 42-45.

The GC maintains the ALJ's unfounded conclusion that "Geaslin asserted her contractual rights by 'insisting that she agreed to bag groceries and merely questioned whether such an assignment was appropriate under the contract.'" AB 32. Thus, according to the GC and ALJ, Geaslin engaged in concerted activity by asserting a contract right during the May 14 meeting. This position is erroneous. Geaslin was not directed to sack groceries on May 14 and it is undisputed that she did not assert a contract right not to sack on that date. Nor could Geaslin have

asserted a contract right on May 14 by discussing what occurred on May 9. To the extent the May 9 incident was discussed at all, according to the ALJ, that discussion amounted to nothing more than one statement by Pelo to Craine that Geaslin refused to bag groceries on May 9. App. 925 at 25-26 (7 ALJD 25-26). Because Geaslin did not actually assert any "right rooted in the contract" during the May 14 meeting, she did not engage in concerted activity.

Then-Member Miscimarra's conclusion that the May 14 meeting was a "grievance meeting," and the GC's restatement of that conclusion, is similarly unsupported by substantial evidence. AB 33-34. It is undisputed that the May 14 meeting was not scheduled as part of the grievance process, but was scheduled by Pelo and Geaslin to discuss Geaslin's May 9 behavior. App. 114:23-115:4. The May 14 meeting was a preliminary meeting to give Geaslin an opportunity to explain her May 9 behavior, and was not intended as an opportunity for Crain to contest Geaslin's discipline. App. 115:5-10; 189:4-7; *see Am. Fed'n of Gov't Employees v. Fed. Labor Relations Auth.*, 865 F.2d 1283 (D.C. Cir. 1989).

It is also undisputed that the Step One grievance meeting did not occur until May 21, after Geaslin was terminated. Because the grievance process was not initiated until the Step 1 meeting that occurred on May 21, the May 14 meeting could not have been an Article 48 "grievance meeting." App. 173:2-174:8; *see*

also App. 800 (Er. Ex. 4). Because Geaslin was not engaged in protected concerted activity on May 14, her suspension and discharge cannot violate the Act.

iii. Geaslin was not disciplined because she engaged in protected concerted activity.

The GC alleges that King Soopers conceded Geaslin engaged in protected activity during the May 14 meeting. *See* AB 40-41. King Soopers, of course, is permitted to argue in the alternative and is doing so in this instance. The GC also argues that the Board's test in *Atlantic Steel*, not *Burnup & Sims*, is appropriate in this case.[8] AB 41. Those cases, however, apply in different circumstances. Under *Atlantic Steel*, the Board considers whether an employee loses the protection of the Act because of his or her opprobrious conduct. *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979). In contrast, under *Burnup & Sims* the Board considers whether an employer violated the Act by disciplining an employee who was engaged in protected activity. *Burnup & Sims*, 379 U.S. 21, 23 (1964). Here, even if the Court affirms the Board's conclusion that Geaslin engaged in protected concerted activity on May 9 and 14, the Board's Decision should still be vacated because

[8] The GC's assertion that it is the "Board's province, not the Company's, to determine the appropriate analysis of a complaint before it" highlights the Board's results-oriented approach. AB 41. The Board is not permitted to apply *any* test it wishes in an effort to reach a desired result to the exclusion of the legally appropriate test. Nor is the Board permitted to overcome judicial review by failing to analyze the appropriate test. *See Sutter*, 687 F.3d at 436-37.

Geaslin was disciplined for insubordination and inappropriate behavior, not because of her purported protected activity.

The GC inexplicably argues that *Wright Line*, not *Burnup & Sims*, is the appropriate test *and* that *Wright Line* does not apply because Geaslin's discipline was "inextricably intertwined." AB 41, n. 7. *Burnup & Sims* applies in this case because the Board has concluded Geaslin engaged in protected activity on May 9 and 14 and, therefore, her insubordination and inappropriate and aggressive behavior toward Pelo on those dates occurred in the course of such protected activity. *See Shamrock Foods Co. v. N.L.R.B.*, 346 F.3d 1130, 1136 (D.C. Cir. 2003) ("*Wright Line* is inapplicable to cases . . . in which the employer had discharged the employee because of alleged misconduct 'in the course of' protected activity."). If the Court finds Geaslin did not engage in protected concerted activity on May 9 and 14, as advocated above, then it need not conduct a *Burnup & Sims* analysis because King Soopers could not have violated the Act.

Geaslin engaged in misconduct by refusing to sack on May 9 when Geaslin questioned, objected, and refused to perform Pelo's work order. OB 47-48. The undisputed facts similarly demonstrate Geaslin engaged in misconduct during the May 14 meeting. OB 48. Pelo's unrebutted testimony on this issue was that she interpreted Geaslin's conduct to be aggressive and disrespectful, and Pelo repeatedly told her as much during the May 14 meeting. App. 925 at 29-32 (7

ALJD 29-32); App. 1051-1054 (Exceptions Brief, pp. 47-50). Likewise, the ALJ found Geaslin engaged in multiple forms of misconduct and violated King Soopers' policies during the May 14 meeting. App. 921 at 1-10 (3 ALJD 1-10); App. 926 at 2-13 (8 ALJD 2-13). The GC does not dispute this conclusion.

In light of the unrebutted testimony that Geaslin was guilty of misconduct on May 9 and 14, the Board's Decision is relegated to an inappropriate effort to interject itself into King Soopers' operations. *See Epilepsy Found. of Ne. Ohio v. N.L.R.B.*, 268 F.3d 1095, 1105 (D.C. Cir. 2001). Because Geaslin engaged in misconduct on both May 9 and 14, 2014, the Board's Decision must be set aside.

F. The Board Erred by Expanding the Act's Remedies.

Apparently dissatisfied with the recovery discriminatees were receiving, the Board unlawfully departed from nearly eight-decades of jurisprudence and expanded the Act's remedies. Under the Board's expansion, employees will recover search-for-work and interim employment expenses regardless of whether those expenses exceed the employee's interim earnings. App. 1221 (BDD at p. 9). The Board's Decision results in a windfall for employees and is punitive to employers.

The expansion of the Act's remedies is a result of then-Acting General Counsel Solomon's[9] decision to reverse the Board's law as described in his 2011 Memorandum. *See* March 11, 2011 Memorandum GC 11-08, pp. 2-3. General Counsel Griffin then took up Solomon's cause in 2015, when he issued his "clarifying" Memorandum, which specifically asked Regions to seek the enhanced remedy, despite Board law to the contrary. *See* January 30, 2015 Memorandum GC 15-01. In the Decision, then-Member Miscimarra dissented with regard to the Board's expansion of the Act's remedies. App. 1225-26 (BDD at pp. 13-14). On January 23, 2017, Miscimarra was named Acting Chairman of the National Labor Relations Board. Thus, this case presents an anomalous situation in which the current Acting Chairman of the Board disagrees with the Board's expansion of the Act. In light of such conflicting views, the Court should decline to adopt the Board's Decision.[10]

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[9] This Court held that Acting General Counsel Solomon served in violation of the Federal Vacancies Reform Act. *SW Gen., Inc. v. N.L.R.B.*, 796 F.3d 67, 74 (D.C. Cir. 2015). Like the underlying action by Acting General Counsel Solomon in that case, Acting General Counsel Solomon's unilateral attempt to expand the Act's remedies in Memorandum GC 11-08 was unauthorized and cannot support the Board's expansion of the Act's remedies here.

[10] Affirming the Board's expansion of the Act's remedies here is an example of "transferring the job of saying what the law is from the judiciary to the executive" that Supreme Court nominee Gorsuch warned against in his concurrence in *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016). Indeed, under the Board's expansive approach, employers' "liberties may now be impaired not by an independent decisionmaker seeking to declare the law's meaning as fairly as

The GC dismisses King Soopers' argument that under the Board's expansion employees are incentivized to seek positions in other locations and for which they are not qualified because the burden of such expenses will be borne by the employer. AB 64-65. It cannot be disputed that disconnecting the link between employees' search-for-work expenses and interim earnings will eliminate the check on employees incurring those expenses. In such circumstances, employees will be free to incur substantial expenses moving, being trained in a new profession, and seeking new employment, regardless of whether those expenses actually lead to interim earnings. Rather than effectuate the purposes of the Act by making discriminatees' whole, this approach will grant discriminatees a windfall and must be invalidated. *See Unbelievable, Inc. v. NLRB*, 118 F.3d 795, 805 (D.C. Cir. 1997).

In addition, as then-Member Miscimarra observed and King Soopers described in its Opening Brief, a windfall will also result to employees who have interim earnings that equal or exceed the sum of their lost earnings and their search-for-work expenses. App. 1225 (BDD at p. 13). The GC dodges these observations and simply recites the Board's decision not to address this issue.

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possible – the decisionmaker promised to them by law – but by an avowedly politicized administrative agent seeking to pursue whatever policy whim may rule the day." *Id.* at 1153.

AB 63-64. The GC and Board's failure to resolve this issue requires that the Decision be set aside.

In a footnote, the GC restates the Board's conclusion that expanding the Act's remedies furthers "the policy interest of deterring illegal actions." AB 61, n. 16. The Board, however, is not "free to set up any system of penalties which it would deem adequate" to "have the effect of deterring persons from violating the Act." *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 12 (1940). Indeed, seeking to "deter" employers from violating the Act has nothing whatsoever to do with making employees whole and is inherently punitive. *United Steelworkers of Am. v. N.L.R.B.*, 646 F.2d 616, 629–30 (D.C. Cir. 1981) (A "fundamental principle governing Board remedies is that the powers of the Board are remedial, not punitive, and the Board may not justify an order solely on the ground that it will deter future violations of the Act.").

The conclusion that the expansion of the Act's remedies in this case is punitive is particularly compelling considering the GC's explanation that an "enhanced remedy" is appropriate here because King Soopers "wreaked havoc" on Geaslin's life. App. 763-764 (GC Ex. 1 (hh), pp. 2-3). Compensating an employee for an employer's "wreaking havoc" on her life is punitive, not remedial.

The Board has chosen to disregard the Act's remedial limitations and impose a punitive award because it believes it will effectuate the policies of the Act and

will "deter" employers from violating the Act. The Board has been previously admonished regarding such inappropriate and unlawful purposes. As Supreme Court nominee Gorsuch recently stated,

> In the end, it's difficult to come away from this case without wondering if the Board's actions stem from a frustration with the current statutory limits on its remedial powers—a frustration that it cannot pursue more tantalizing goals like punishing employers for unlawful actions or maximizing employment; that it is limited instead to the more workmanlike task of ensuring employees win backpay awards that approximate the actual losses they've suffered. A frustration that seems to parallel the frustration the Board experienced when it sought in *Republic Steel* and *Phelps Dodge* to issue similarly expansive extra-statutory remedies. But then as now frustration should not beget license. In our legal order the proper avenue for addressing any dissatisfaction with congressional limits on agency authority lies in new legislation, not administrative ipse dixit.

N.L.R.B. v. Cmty. Health Servs., 812 F.3d 768, 786 (10th Cir. 2016) (Gorsuch, J) (dissenting). The Board cannot unilaterally expand the Act and legislate additional remedies, as it does here. The Board's Decision exceeds its statutory mandate and must be set aside.

CONCLUSION

Based on the foregoing, the Court should set aside the Board's Decision in its entirety.

Dated: February 16, 2017.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the 6,500-word type-volume limitation in Fed. R. App. P. 32(a)(7)(B)(ii) because the brief contains 6,285 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 31(a)(5) and the type style requirements of Fed. R. App. P. 31(a)(6) because the brief has been prepared proportionally-spaced typeface using Microsoft Word in 14-point Times New Roman font.

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of February, 2017, I electronically filed the foregoing **PETITIONER'S REPLY BRIEF** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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I further certify that on this 16th day of February, 2017, I sent the required copies of the Petitioner's Reply Brief to the Clerk of the Court via overnight delivery.

s/ Mary Navrides, Legal Secretary